SARKAWI DAHLAN

v.

PP

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 42-14 OF 2002]
8 JULY 2004

CRIMINAL PROCEDURE: *Sentence - Mitigating factors - Whether advanced age of accused a relevant mitigating factor notwithstanding magnitude of crime - Whether failure to take into account advanced age of accused would result in a harsh and excessive sentence*

The 65-year-old appellant was sentenced to 15 years' imprisonment for rape by the Sessions Court. No whipping was imposed on account of the appellant's age. He appealed to the High Court the against conviction and sentence.

Held (dismissing the appeal against conviction but reducing the sentence of imprisonment to 10 years):

[1] The advanced age of the appellant was a mitigating factor. The appellant was 65 and the trial court ought to have taken that into account. The trial court ought to have considered that an unduly long, though deserving, sentence could mean that the appellant would remain in prison for the rest of his natural life. An unduly long sentence could mean that the appellant would have no hope of returning to society. That, even in the light of the magnitude of the crime, would be harsh and callous. (p 611 e-f)

[2] Mitigating factors are not to be routinely disregarded, even if the offence calls for a deterrent sentence. Given that the appellant was 65, the failure to take into account the age of the appellant resulted in a harsh and excessive sentence. (p 612 b)

Case(s) referred to:
Chiu Nang Hong v. PP [1963] 1 MLJ 119 ***(refd)***
Lee Peng Kong v. PP [1986] 2 CLJ 139; [1986] CLJ (Rep) 437 HC ***(refd)***
Low Oi Lin v. R [1949] MLJ 210 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] MLJ 130 ***(refd)***
Mohamed Kunju v. PP [1966] 1 MLJ 271 ***(refd)***
PP v. Nordin Yusmadi [1996] 2 CLJ 90 HC ***(refd)***
R v. Kenneth John Ball 35 Cr App R 164 ***(refd)***
R v. Murukaiyan Rasoo [1957] MLJ 26 ***(refd)***

Legislation referred to:
Penal Code, s. 376

Other source(s) referred to:
Halsbury's Laws of England, Hailsam edn, vol 9, para 365

For the appellant - Mohd Razak Sharif; M/s Razak, Fakrul & Co
For the respondent - Haslinda Abu Bakar, AG's chambers

Reported by Andrew Christopher Simon

JUDGMENT

Jeffrey Tan J:
This is an appeal against conviction and sentence with respect to the following offence under s. 376 of the Penal Code.

> Bahawa kamu pada akhir bulan Julai 1998, di rumah No. 60, Lorong 5E, Kg. Muhibah, Perasai, di dalam Daerah Batu Pahat, di Negeri Johor, telah di dapati merogol Juliana @ Jurianah bt Muhari, surat beranak F 555414 Umur 14 tahun 7 bulan, oleh yang demikian itu kamu telah melakukan kesalahan dan boleh di hukum di bawah Seksyen 376 Kanun Keseksaan.

At the end of a full trial, the Batu Pahat Sessions Court convicted and sentenced the appellant to a term of imprisonment of 15 years, but did not order the appellant to be whipped on account of the age of the appellant who was 65 years old.

On 16 April 2004, at the end of submissions here, this court dismissed the appeal against conviction, but reduced the sentence of imprisonment from 15 years to 10 years. This court also ordered the appellant who was then out on bail to serve his sentence to be carried out with immediate effect.

This court has now received notice that the appellant has lodged a further appeal to the Court of Appeal against that reduced sentence of ten years imprisonment. It would seem that the appellant is yet dissatisfied with the reduced sentence. Be that as it may, the following are the grounds for the reduction of the sentence of the trial court.

First, it has to be said that rape is a serious offence (see *Chiu Nang Hong v. Public Prosecutor* [1963] 1 MLJ 119). "The offence of rape is a serious one and the degree of seriousness of the offence must be reflected in the sentence" (see the judgment of the trial court in *Mohamed Kunju v. Public Prosecutor* [1966] 1 MLJ 271).

KC Vohrah J (as he then was) in *Public Prosecutor v. Nordin bin Yusmadi* [1996] 2 CLJ 90, gave the following and most apposite statement with respect to the offence of rape and the sentence.

> Rape is a serious offence reflected in that Parliament has imposed a minimum of 5 years imprisonment for the offence. It cannot be treated light.

No question about it, rape is a vile and serious offence, and a light sentence was out entirely of the question in the present case. The appellant should be severely punished. The fact of the matter was that the appellant committed a despicable act. The appellant had raped a young gullible girl who trusted the appellant as her "bapa angkat". As rightly held by the trial court, the appellant had not only raped but also betrayed his victim - "Boleh dikatakan mangsa boleh dianggap sebagai cucu dia, Dia telah mengambil kesempatan terhadap mangsa yang menganggap dia sebagai bapa angkat. Dia telah belot dan mengkhianati mangsa" (see p. 23 of the Appeal Record).

In the following sentence, the trial court said "Oleh sebab umur dia tidak dimaksudkan, dia tidak boleh dijatuhkan hukuman berat. Oleh sebab umur dia hukuman sebat tidak deberi". The meaning of those words is not clear. But it would appear from the totality of the grounds (see pp. 23 - 24 of the Appeal Record) that the advanced age of the appellant and the difference in age between the appellant and his victim were held by the trial court as aggravating factors against the appellant. And indeed, the advanced age of the appellant and the difference in age between the appellant and his victim were not endearing factors. But it was overlooked that the advanced age of the appellant was also a mitigating factor. The appellant was 65, and the trial court ought to have taken that into account. The trial court ought to have considered that an unduly long but even though deserving sentence could mean that the appellant would remain in prison for the rest of his natural life. An unduly long sentence could mean that the appellant could have no hope to return to society. And that, even in the light of the magnitude of the crime, would be harsh and callous. That is not to say that the instant crime should be condoned. But the appellant should not be literally left in prison for the rest of his natural life, which given the age of the appellant would be the probable result if the 15 years sentence were to be affirmed. Granted, " ... in deciding the appropriate sentence ... the first and foremost consideration is the public interest" (*R v. Kenneth John Ball* 35 Cr App R 164; see also *Regina v. Murukaiyan Rasoo* [1957] MLJ 26). But public interest is not the only consideration. In assessing sentence, all the circumstances of the offence should be considered (*Low Oi Lin v. R* [1949] MLJ 210).

The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentences, his age and character (*Mohamed Jusoh bin Abdullah & Anor v. Public Prosecutor* [1947] MLJ 130, citing *Halsbury's Laws of England* (Hailsam Edition) Vol 9, para 365). Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v. Public Prosecutor* [1986] 2 CLJ 139; [1986] CLJ (Rep) 437). And in the opinion of this court, given that the appellant was 65, the failure to take into account the age of the appellant resulted in a harsh and excessive sentence. Sentence is therefore reduced to a term of imprisonment of ten years, which with the normal remission would give a measure of hope to the appellant that he would be eventually released before his natural death.